sidering the same facts from which the Special Commissioners drew their inference. Reference may be made to the South African cases of *Ochberg* v. *Commissioner of Inland Revenue*[2] and *Commissioner of Taxation* v. *G's Estate*.[3] In the latter case it was said:

"All the relevant facts were found by the Special Court. The only question was whether on these facts the deceased could be said to be 'carrying on business' and that is a question of law. . . ."

The question of what the intention of a taxpayer was when he acquired an asset, *i.e.* whether he bought it as an investment or with a view to selling it at a profit, is a question of fact. It has to be determined by inference from proved facts and such an inference is one of fact and not of law. Where, however, the intention of the taxpayer does not depend merely on inference from facts but depends largely on the construction of documents, *e.g.* an agreement or Memorandum of Association that raises questions of law.

I agree with the learned counsel for the respondent that findings of fact are only assailable if there was no evidence on which the findings could be properly reached, or if it can be shown that it was a finding of fact at which no reasonable person could arrive.

It was the duty of the Special Commissioners to have considered every relevant fact *both for and against* the appellant with due care and if they failed to take into consideration some material evidence or had overlooked some crucial fact, their act amounted to a misdirection in law. In such an event it is the duty of the court to interfere and in a proper case the decision of the Special Commissioners can be set aside on that ground.

There were certain essential facts in this case on which it was the duty of the Special Commissioners to have applied their minds and to have given their findings. Only after due consideration of those material facts could they have come to their findings, one way or the other. I find from the record that in this case they have: —

(1) failed to consider and find what was the intention of the appellants at the time of the acquisition by them of the lands — whether the lands were acquired for the purpose of resale or as a pure investment;

(2) failed to consider the effect of certain vital and relevant entries in the balance sheets and statements of accounts which were at least capable of indicating the intention of the appellants and whether that intention (if it was there) had at any time changed from investment to resale for profit. It would appear that the sale proceeds from the lands were utilised by the appellants either for payment of debts or for reinvestment in a fixed deposit account.

(3) failed to consider that the appellants were throughout the relevant period a company wholly comprised of those shareholders who were members of a single family;

(4) failed to consider and give a finding thereon whether the appellants after their formation bought any land from any stranger or a person who was not a shareholder of the company or a member of the family of Ng Yin Fong;

(5) failed to take into consideration the interval of time between the buying or acquisition of lands and their respective resales.

These were some of the very vital and important matters on which the Special Commissioners should have given their findings or at any rate they were matters which they should have adequately considered. The record does not show that any thought or consideration was given to any of these matters. Although I have the powers to interfere and come to my own findings I am in the circumstances reluctant to do so as the primary duty to come to findings of fact lies on the Special Commissioners. The case is consequently remitted back to the Special Commissioners.

I understand some of the Special Commissioners are no longer available to serve. The case may consequently be dealt with *de novo* by another set of Special Commissioners.

The costs of this appeal will abide the result of findings and the decision which may be arrived at by the Special Commissioners as a result of this order or an appeal, if any, therefrom.

Order accordingly

Solicitors: *Maxwell, Kenion, Cowdy & Jones.*

IN THE ESTATE OF SHAIKH MOHAMED BIN ABDUL RAHMAN BIN HAZIM

[O.C.J. (Chang Min Tat J.) April 25, 1974]
[Penang — Originating Summons No. 33 of 1972]

Muslim Law — Marriage — Validity of — Non-compliance with provisions of Administration of Muslim Law Enactment, 1959, ss. 114, 115 & 116.

In this case the applicant applied as the husband of a named beneficiary in the will of the deceased, and as a person interested in the administration of the estate. The respondents, the executors and the trustees of the estate, opposed the application and the first respondent denied that the applicant was the lawful husband of the named beneficiary.

Held: (1) on the facts the applicant's deceased wife Hanifah binte Abdul Aziz alias Aminah binti Abdul Aziz was one and the same person as Hanifah binti Shaikh Abdul Aziz, the beneficiary in clause 4(c)(ii) of the will of the deceased;

(2) even though the conditions of sections 114, 115 and 116 of the Administration of Muslim Law Enactment were not complied with in this case, the marriage was valid, as the respondents had failed to rebut the presumption in favour of the validity of the marriage.

Case referred to:-

(1) *Bowler* v. *John Mowlem & Co. Ltd.* [1954] 1 W.L.R. 1445, C.A.

ORIGINATING SUMMONS.

A. Muttiah for the applicant.

B. S. S. Kanda for the first respondent.

K. Ahmad for the second respondent.

Chang Min Tat J.: This is an application by originating summons made by the husband of a named beneficiary in a will, as a person interested on the death of his wife in the reliefs sought for (a)

administration of the estate, with all necessary and proper accounts, directions and enquiries, (b) costs and (c) further or other relief.

The respondents are the executors and trustees of the estate. The first respondent denied, in his affidavit, that the applicant was the lawful husband of the named beneficiary and that if the beneficiary had in fact married the applicant, the marriage was illegal and void and of no effect for breaches of the provisions relating to Muslim marriages. The second respondent contented himself with merely saying that he did not know who the applicant was and that he did not know whether he was lawfully married to the beneficiary.

The beneficiary concerned was, as in the will, Hanifah binti Shaikh Abdul Aziz who was the granddaughter of the testator and given by him two-eighteenth equal shares in the residuary estate.

The mother of Hanifah filed an affidavit supporting the allegations of the applicant. She and the applicant were served with a notice of cross-examination on their affidavits.

This case which fairly bristled with difficulties of procedure and form came up for hearing before me on 16 April 1974. A last minute objection to the form was made, but it was too late and I did not think I should delay further the hearing of this case. Whether an originating summons is a suitable vehicle for a trial of what are clearly difficult questions of fact is an objection that should have been taken at an early stage. But since it was not, the court would have to struggle along.

Then it was said that the applicant had not taken out letters of administration in the estate of his wife for the sole reason that he was not given the particulars of the assets comprised in the bequest to her. That may be so, but the extent is known. It is two-eighteenths of the residuary and any difficulties in assessing the estate duty payable could be met by a not unreasonable request, in the circumstances, for deferment of payment. Without any grant, he has now sued in a personal capacity. No objection was taken, I believe, with respect quite correctly, see, *inter alia*, *Bowler* v. *John Mowlem & Co. Ltd.*,[1] but if the case turns in his favour, he will in all probability find some difficulty in enforcing the prayers for administration of the estate of the testator, with all necessary and proper accounts, directions and enquiries.

At the commencement of the case, counsel for all the parties advised me that they had narrowed the issues to

(1) whether the applicant's deceased wife was one and the same as the beneficiary Hanifah binti Shaikh Abdul Aziz in the will, and

(2) the validity of the marriage between the applicant and Hanifah.

The first issue is basically an issue of fact. The onus of establishing this fact is clearly on the applicant. He produced his marriage certificate. The name of the bride was Hanifah binti Abdul Aziz. Her identity card number was also noted. The marriage was performed at Kampong Senggang, Kuala Kangsar on 19 February 1964. He also produced the death certificate. The name given was Aminah binti Abdul Aziz and the age was stated to be 21 years. The cause of death was exhaustion with impending uterine rupture and toxaemia. It was the result of an unfortunate delivery. The child of the marriage was still-born, a little more than 6 hours before her death. The certificate of still-birth was produced by the first respondent and marked as an exhibit. The applicant also produced two wedding photographs. He averred that Hanifah and Aminah were one and the same person.

Counsel for the first respondent cross-examined the applicant firstly on his failure to comply with various provisions under the Administration of Muslim Law Ordinance (Penang) No. 3 of 1959. Then he cross-examined the applicant on what were alleged to be discrepancies in his evidence. The age of his wife was given as 21, when in fact it was 26. It was also suggested that the omission of his name and the obviously wrong address of the mother on the certificate of death of the child must mean that the mother referred to in the certificate could not be the beneficiary.

As to the age of Hanifah, it was clarified by reference to the Registrar of Citizens that from the Identity Card number given of Hanifah, her age was not 21 but 26 years. The mistake was one of fact and did not arise from any attempted substitution of one person for another.

The mother of Hanifah also gave evidence. She identified the applicant as the person who had married her daughter Hanifah with her approval and she also identified the bride in the wedding photographs as her daughter. She also testified that her daughter was also known as Aminah and that she was informed of her death by the applicant and that she visited the grave in Kuala Kangsar about a week after the death.

The first respondent did not challenge the identity of this witness, as the wife of Shaikh Abdul Aziz and the mother of a girl Hanifah, for an obvious reason. He had himself married her eldest daughter Latifah and they had lived together for many years at No. 68 Cantonment Road, Penang. He averred that some time in 1964 (at about the time of the applicant's marriage) Hanifah had run away and he did not know for a fact what had happened to her, whether she had married and whether she had died in childbirth or was still alive. He had not given any consent to any marriage, though he was, as he claimed, Hanifah's guardian.

In cross-examination, he was shown the wedding photographs and asked to identify the bride. Hanifah had been living in the same house since 1951 and there ought to be no difficulty in his recognition of Hanifah. The photographs were more than reasonably clear. But he stated quite categorically that he could not recognise the bride in the photographs. He even suggested that the mother was mistaken.

The second respondent averred that his consent to the marriage was also not obtained, but he had absolutely no difficulty and showed no hesitation in identifying the bride in the wedding photographs as Hanifah, the beneficiary in the will.

On this question of fact, I find myself asked by the first respondent to say that a mother is mistaken

in her daughter and that his co-executor is wrong and that he alone is correct that the bride was not Hanifah. I have not the slightest hesitation in accepting the evidence of the mother and in preferring the evidence of his co-executor to his. To my mind, the evidence of the mother is not challengable and in view of this evidence, all the suggestions of discrepancies, both apparent and deducible, fall to the ground especially as these are also explainable by human error or oversight or carelessness. As for the evidence of Syed Abu Bakar bin Syed Sagaf who was called to establish that the mother was not a witness of truth simply by averring that the trip to Kuala Kangsar to visit the grave of Hanifah took place not 4-5 days after her death but one month afterwards, I dismiss it, in so far as the dating is concerned, as a fabrication: It was not explained to me how this gentleman could nearly 9 years afterwards recall the date of the journey.

I therefore find as a fact on the evidence adduced that the applicant's deceased wife Hanifah binti Abdul Aziz alias Aminah binti Abdul Aziz is one and the same person as Hanifah binti Shaikh Abdul Aziz, the beneficiary in clause 4(c)(ii) of the will.

On the question of the validity of the marriage, I am asked by the first respondent to declare the marriage illegal, void *ab initio* and of no effect, merely by reasons of the breaches of sections 114, 115 and 116 of the Administration of Muslim Law Enactment 1959 in force in Penang as from 1 November 1959. Section 114 merely provides for the application of the law to persons professing the Muslim Religion and section 115 the appointment of persons to solemnise and register such marriages. Section 116 is the relevant section and provides, in sub-section (3), that before the marriage of a Muslim woman, the Registrar shall make a full enquiry in order to satisfy himself that there is no lawful obstacle according to Muslim law before performing the marriage ceremony.

Sub-section (4) provides that

"If there is no wali of the woman to be wedded or a wali shall without adequate reason to be approved by the Registrar refuse his consent to the marriage, the marriage may be solemnised by the Registrar for the Kariah in which the woman to be wedded ordinarily resides,"

with a similar provision for an enquiry.

Section 118 provides that every marriage shall be solemnized in the Kariah Masjid in which the bride ordinarily resides, provided that a Registrar having jurisdiction in such Kariah may give permission for any such marriage to be solemnised elsewhere.

The onus of challenging the validity of the marriage is on the respondents but in the discharge of this onus, they had failed to establish that they were at law the wali of the bride and that their consents, singly or jointly were vital to the marriage. Then, while the marriage should ordinarily have been solemnized in Penang in this case, there was provision for it in section 118 *supra* to be solemnised elsewhere. The only questions are the permission of the Registrar in the Masjid of the bride's ordinary residence and the enquiry in sub-section (3) of section 116. The evidence led by the respondents was merely that they knew of no enquiries as they were not consulted, but they failed to call the Registrar in Penang to give evidence that his permission had not been given or that the enquiry laid down had not been made.

In my view, the respondents have failed to rebut the presumption in favour of the validity of the marriage.

I also noted that there is nothing in the Enactment which says that the breaches of any of the requirements for a Muslim marriage render the marriage invalid or void, and Mr. K. Ahmad, after consultation with the Kathi of Penang, conceded from the Bar that even if the breaches alleged had been proved, the marriage was not invalid or void. Mr. A. Muttiah for the applicant produced a statement of the relevant law signed by the Mufti and Chief Kathi of Penang and another member of the Jabatan Hal Ehwal Ugama, Penang that a wedding ceremony is valid if it is solemnised in accordance with the conditions of Islamic Religious Laws even though the wedding ceremony does not comply with the conditions of sections 114, 115 and 116 of the Administration of Muslim Law Enactment 1959. With respect, I am of the opinion that this statement is a correct statement of the law.

In my finding, the said marriage is valid.

Finally, it is to be noted that this will being a disposition of all the assets of a Muslim to strangers in the sense of persons who are not according to the Muslim Law of distribution heirs, is by this law a valid disposition.

On the findings, the applicant is entitled to the prayer he sought but I hope he will exercise his mind to consider whether he could effectively enforce the order for administration before extracting the grant of letters of administration in his wife's estate. In this respect, I would presume to differ from him and think that he could apply for and extract such a grant even in the present state of his knowledge.

On costs, the second respondent who had obviously kept an open mind and readily admitted to the truth when confronted with the evidence should be entitled to have his costs paid out of the estate and I so order. The first respondent did not match this attitude, nor had he the inclination to admit what he could not easily deny. He will personally pay the applicant's costs.

Order accordingly.

Solicitors: *Subbiah & Co.; Kanda & Co.; K. Ahmad & Yong.*